Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

LUIS ADEL BORDON, LUIS BORDON
and ADEL BORDON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *United States v. Kastigar*, 406 U.S. 441, 92 S. Ct. 1653 (1972), and *United States v. Hubbell*, 120 S. Ct. 2037 (2000), as they construe 18 U.S.C. §§ 6002 and 6003, and the Self Incrimination Clause of the Fifth Amendment to the Constitution of the United States, allow or countenance the waiver of "derivative use immunity" through the execution of a letter agreement, by a target of investigation and for indictment, prior to his submitting to interrogation by enforcement agents, where the information taken from the accused is thereafter used to indict and try him, and no plea agreement was ever entered into? Said another way, is "use immunity" fungible?

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OPINION BELOW

The opinion below, rendered by the United States Court of Appeals for the Eleventh Circuit on July 21, 2000, was unreported and unpublished. It is reproduced in the appendix at 1a. Rehearing and rehearing *en banc* were denied in an unpublished order on September 27, 2000. App. 16a. This Petition is timely.

STATEMENT OF JURISDICTION

By virtue of the rendition of the original judgement by the Eleventh Circuit on July 21, 2000, and the denial of the petitions for rehearing and rehearing *en banc* on September 27, 2000, the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Luis Adel Bordon ("Luis, Sr."), is the father of Luis Bordon ("Luis Jr.") and Adel Bordon ("Adel"). Luis, Sr., owned a liquor store in the Greater Miami area where there was installed a Florida Lottery ("Lotto") vending terminal. One of the prominent services available at that store was the cashing of checks, pursuant to licensure by the State of Florida. As early as 1990, police officers began investigating one Fernandez, who was portrayed by prosecutors as "one of the biggest bolita operators in Dade County at the time[1]."

1. "Bolita" is an illegal wagering game based upon the random selection of winning numbers, essentially on a daily basis. Over the years there have been several selection methods: the winning numbers from various lotteries in Puerto Rico and the winners at local dog races were the most common. A wagering violation is a criminal misdemeanor under State law.

Fernandez and Luis, Sr. were close friends of more than 40 years' standing: Fernandez had saved Luis, Sr.'s life by hiding him out from Castro's army and intelligence agents, and finally smuggling him off of the island. In June of *1994* the police searched Luis, Sr.'s liquor store. (At the time, Petitioner Adel had just graduated from High School, while Petitioner Luis had just been honorably discharged from the Marine Corps.) They seized slightly more than $128,000.00 in cash (the raid occurred at the beginning of a busy check-cashing period), plus another twenty thousand or so dollars' worth of checks. *No arrests were made.*

In the interim, Luis, Jr. and Adel founded and opened their own wine and liquor stores in other parts of Greater Miami. All three stores were known as "Gulf Liquors."

Later still, in 1996, while trying to get the money returned, the three Petitioners, on the advice of predecessor counsel, and under threat of indictment upon refusal, each subscribed an identical letter agreement with government attorneys who had now taken over the "investigation" that would have each, individually, make a "proffer" of testimony and evidence they could render if otherwise all parties agreed on other terms, but such a proffer would be made, when given, only with "use immunity" protection.[2] Between August 28, 1996, and September 25, 1996, the Petitioners were "debriefed" (interrogated) six different times by the police. Quantitatively, more attention focused upon Luis, Sr. than either of his sons: *he* was the one with the demonstrable ligament to Mr. Fernandez. Government lawyers then told

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2. These letters first received attention during the trial when defense counsel revisited the *Kastigar* issue of which the Trial Judge had first been squarely put on notice by pre-trial motions.

Luis, Sr., that they wanted him to testify against Fernandez. He was told that his sons would be indicted if he did not. He declined. He and his sons were indeed indicted, as we describe more particularly below. A large quantity of the *substantive* material presented to the indicting Grand Jury and at trial squarely matches that which came to the government from the mouths of the Petitioners.

The indictment was returned on June 6, 1998 — but a scant time before the running of an Order to Show Cause directed to the government in respect of the seized funds. They were arraigned on June 16. On July 7, 1998, the Trial Court set the case for trial on August 17, 1998. They then moved for an order compelling production by the government of the Grand Jury testimony of its indicting (summary) witness and reports written by certain "agents." That motion clearly identified itself as the precursor to a motion raising, and proceedings under, *Kastigar v. United States* (*Id.*), but it was *denied*. A jury trial began on August 17, 1998, and, two weeks later, all three Petitioners were convicted. The jury also found each of the Petitioners liable in forfeiture of a sum in excess of $5½ million.

On July 21, 2000 a panel of the Eleventh Circuit affirmed the Petitioners' convictions, vacated their sentences and remanded the case for re-sentencing. As has previously been said, Petitions for Rehearing and Rehearing *en banc* were denied.

REASONS FOR GRANTING THE WRIT

The Opinion of the Court of Appeals conflicts with *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653 (1972) and failed to consider or apply last Term's opinion

in *United States v. Hubbell*, __ U.S. __, 120 S. Ct. 2037 (2000) — the latter of which extended and amplified the former — and therefore, dilutes if not wholly strips, the Petitioners of the protections and immunities afforded and required by the Fifth Amendment.

The Panel Opinion concluded that *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653 (1972): (a) was not violated and therefor did not require remand for a hearing by the United States District Judge ("the District Judge") to determine whether a violation had occurred[3], and (b) was "waived," also obviating the need for a remand.

I.

"DIRECT" VERSUS "DERIVATIVE" USE.

The Panel Opinion misconstrued or misapprehended facts of record in believing that the immunized evidence taken from the Petitioners during their "proffer" to police agents some two years prior to their indictment was thereafter "derivatively" used against them to indict and prosecute them, rather than being "directly" used. We had shown, however, that *specific information* given to police agents by the Petitioners provided information not known to them previously (names of the makers of checks and identifying writings on certain of those checks), which information was then repeated to the indicting grand jury by the summary witness, one Boyd, and yet again used against all three Petitioners at trial, over repeated objection. Thus, the

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3. Implicit in this holding, we think, was its corollary that the District Judge's denial of our several pre-trial requests for such a hearing was not error.

"evidence" in question was not at all "derivative" evidence but, rather, "direct" evidence.

II.

IS IMMUNITY FUNGIBLE?

The case at Bar dealt with bargained immunity provided by a "proffer agreement." *Hubbell*, *supra*, like *Kastigar*, *supra*, dealt with order immunity pursuant to 18 U.S.C. §§ 6002 and 6003, but for these purposes no distinction is to be found there. *Taylor v. Singletary*, 148 F.3d 1276 (11th Cir. 1998) (*but see infra*, how we show the Panel's inappropriate or mistaken reliance upon another feature of *Taylor*).

Kastigar, *supra*, did *not* make ***any*** distinction between "use immunity" and "derivative use immunity," for Constitutional purposes: in order to supplant or neutralize one's Fifth Amendment Privilege against self-incrimination, the "immunity" necessary would (and must) prohibit *any* use of testimony rendered in response to compulsory immunization (here, of course, the compulsion was the threatened indictment of a man and his two sons) in order to satisfy Constitutional requirements and the Amendment's protection — *both* components. The Court contrasted the "new" immunity statute against the concededly-insufficient provisions of the statute disapproved in *Counselman v. Hitchcock*, 142 U.S. 547, 12 S. Ct. 195 (1892), which resulted in the transactional immunity statute later replaced by § 6002; and to do so, the Court pointed out the shortcomings of the *Counselman* statute — that which it would not or could not do, rendering it Constitutionally unacceptable. The statute:

> could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding . . . (Court's citations omitted by this writer); *Kastigar*, *supra*, at 1661
>
> . . . .
>
> Could not prevent the obtaining and use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted; *Id.*
>
> . . . .
>
> affords no protection against that use of compelled testimony which consists in gaining therefrom knowledge of the details of a crime, and sources of information which may supply other means of convicting the witness or party. *Id.*

Going then to *Ullman v. United States*, 350 U.S. 422, 76 S. Ct. 497 (1956), the *Kastigar* Court added as another reason for insufficiency:

> . . . the immunity granted was incomplete, in that it merely forbade the use of testimony given and failed to protect a witness from future prosecution based upon knowledge and sources of information obtained from the compelled testimony.

Kastigar, *supra*, at 1661, 1662. *Kastigar* did not and does not view "immunity" as being fungible. In order for immunity, whether by statute or "agreement," to accommodate one's Fifth Amendment privileges and protections, said *Kastigar*, *both* "use" and "derivative use" prohibitions must be present. Since *Kastigar*, there has been no opinion of this Court that says anything otherwise, or anything less demanding.

The Eleventh Circuit said that immunity, like any Constitutional right, can be waived. Perhaps; but *not in piecemeal fashion*; not in part; and certainly, not in a manner that would leave it to the government to decide what has been "waived" and what has not ("A person accorded [ ] immunity . . . and subsequently prosecuted is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." *Kastigar*, *supra*, at 1665) One cannot invoke one's right to counsel and then be prohibited *to speak to* counsel. One cannot complain of an unlawful arrest but be prohibited from complaining of a search incident to such an arrest. One cannot block being put to death by stoning but then be left in the pillory till starved.

This Court in *Hubbell*, *supra*, found the respondent to have been immunized through his production of a huge quantity of documents pursuant to a subpoena issued by the Office of Independent Counsel, supported by a § 6003 order. The government posited that the production of the documents was not in and of itself "testimonial." This Court, noting that the subpoena constituted the classic "fishing expedition," also noted that it compelled Hubbell to provide *information about which the government had previously been totally unaware* (as is true here), and that the privilege against self

incrimination, and therefor its correlative immunity, embraces information " '. . . which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.' *Hoffman v. United States,* 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951)." *Hubbell*, at 2044.

Hubbell also focused upon *Counselman, supra.* Applying its prior jurisprudence, this Court in *Hubbell* said, again, that the *sine qua non* of *immunity* is proof that a prosecution is based upon evidence derived from ". . . a legitimate source *wholly independent of the compelled testimony.*" *Id.* at 2045 (emphasis by the writer). Further still:

> Kastigar requires that the respondent's motion to dismiss the indictment on immunity grounds be granted unless the Government proves that the evidence it used in obtaining the indictment and proposed to use at trial was derived from legitimate sources "wholly independent" of the testimonial aspect of respondent's immunized conduct . . .

Id. at 2048.

Just like *Kastigar*, *Hubbell* makes it plain that at the first moment a defendant in criminal proceedings raises a claim of immunity based upon prior statements to prosecutors or agents or a grand jury, a District Judge *must* — not, "may," but "must," make sufficient inquiry, one at which the government carries the burden. *Kastigar, supra*, at 1665.

> *We have no doubt that the constitutional privilege against self-incrimination protects the target of a grand jury investigation from being compelled*

> *to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence.*

Id. at 2047 (all emphasis by the writer).

How could it be any more clear?

III.

WAIVER.

First, the Court of Appeals pointed to *Taylor v. Singletary*, *supra*, as partial support for its conclusion that the Petitioners "waived" a *Kastigar* hearing when they subscribed the so-called proffer letter. With all due respect, however, the Panel opinion misapplied *Taylor* inasmuch as these Petitioners did *not* ultimately enter into any agreement with the government which conferred any sort of benefit upon them whatsoever. *Taylor* was promised that he would not be prosecuted by the government for certain crimes if he kept his part of the testimonial bargain. The Petitioners bargained for and received *nothing* — except immunity. In exchange, they were required to, *and did*, submit to extensive and rigorous "debriefings." The purpose of the debriefings was to allow each "side" to see if "the other side" had something desirable to offer in exchange for which there was something to be given. Nothing was given, nothing "waived."

Second, this Court, in *Kastigar*, has said that a determination of the sufficiency of a putative defendant's performance in the face of an immunity grant cannot be, and is not, left to ". . . the integrity and good faith of the prosecuting authorities." *Op. cit.* at 1665. Thus, that an

Assistant United States Attorney includes in a proffer letter language which s/he *wants* to ". . . obviate the viability of any potential [*Kastigar*] hearing . . ." certainly doesn't mean that the government gets to make that decision. To the contrary, a determination whether *either party* to an agreement (if indeed an agreement there was) is in breach (and, in the last analysis, that's what the government was trying to avoid) is committed by our system to the determination of the fabled "neutral and detached magistrate."[4]

Third, under "basic contract law," if we must go that far, the enforcement of a release or supposed waiver for breach of a statutory duty imposed upon another (here, the recognition of its own immunity grant by the government), where the statutory duty (here, the Fifth Amendment) is designed to protect another, is and would be contrary to public policy. *Torres v. Offshore Professional Tour, Inc.*, 629 So. 2d 192 (Fla. 3d DCA 1993). An exculpatory clause or "waiver" which purports to absolve one party for responsibility for damages to another caused by the negligence of the first is ineffective where the "damage" (here, criminal prosecution) arises out of failure to comply with legislation of any sort which is designed to protect the damaged individual, or the public, generally. *John's Pass Seafood Company v. Weber*, 369 So. 2d 616 (Fla. 2d DCA 1979).

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4. Can a government lawyer say, "We have concluded that we have provided everything in our files required by *Brady*, and the fact that you, Mr. Defense Lawyer, think that this entire subfile contains exculpatory materials is meaningless. We have spoken!" and thus avoid judicial review? Or: "You may think, Mr. Defender, that your client's six months undercover with covert electronics constitutes substantial assistance, but we don't think so. No 5K1.1, No Rule 35?"

Given especially close scrutiny and disfavor within this area of "contract law" are "*pre-incident* releases." *Fana v. Orkin Exterminating Co., Inc.*, 734 So. 2d 434 (Fla. 3d DCA 1999).

> It is settled law that a pre-incident release is not effective to preclude an action based upon the releasee's subsequent negligence unless the instrument clearly and specifically provides for a limitation or elimination of liability for such acts.

Fana, at 435.

Here, of course, the "incident" complained of is and was the *direct* use of immunized testimony. Not by any reading of the proffer letter, no matter how elastic, was such a thing contemplated by the Petitioners — nor by the government, as well it could not be.

CONCLUSION

The Writ of Certiorari should be allowed so as to conform the decisional authority of the United States Court of Appeals to both *Kastigar* and *Hubbell*, and, in thus doing, to accord the Petitioners the full benefit of the "use immunity" necessary to supplant one's privileges and protections under the Fifth Amendment to the Constitution of the United States.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JULY 21, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-5841
Non-Argument Calendar

D. C. Docket No. 98-00427-CR-JLK

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

LUIS ADEL BORDON, LUIS BORDON,
ADEL BORDON,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(July 21, 2000)

Before BIRCH, CARNES, and WILSON, Circuit Judges.

PER CURIAM:

Luis Adel Bordon, Luis Bordon, and Adel Bordon, (the Bordons) appeal their convictions for conducting an illegal

gambling business and conspiracy to commit money laundering. The government cross-appeals the Bordons' sentences. We affirm the Bordons' convictions but vacate and remand for re-sentencing.

BACKGROUND

At trial, the government presented evidence that several organizations serving as illegal gambling (bolita) operators accepted checks from betters. These checks were deposited into the bank account of Gulf Liquors, which was a business owned by the Bordons. A jury found the Bordons guilty of conducting an illegal gambling operation in violation of 18 U.S.C. § 1955, and with conspiracy to conduct financial transactions involving proceeds of specified unlawful activity in violation of 18 U.S.C. § 1956(h). Adel and Luis Bordon were each sentenced to 46 months of imprisonment followed by two years of supervised release. Their father, Luis Adel Bordon, was sentenced to 57 months of imprisonment followed by two years of supervised release. The court entered an order against the Bordons directing the forfeiture of money involved in the offenses.

The Bordons raise four issues on appeal: (1) whether the trial court abused its discretion by denying their motion for a continuance of trial; (2) whether the money laundering count of the indictment was duplicitous; (3) whether the forfeiture of almost six million dollars was grossly disproportional to the offense charged; and (4) whether the district court erred in failing to hold a *Kastigar*[1] hearing to

1. *Kastigar v. United States*, 406 U.S. 441 (1972).

determine if the government used immunized evidence against them. The government's cross-appeal presents two issues: (1) whether the district court miscalculated the Bordons' base offense level at 20 instead of 23 and (2) whether the court erred by departing downward by two levels.

II. DISCUSSION

BORDONS' APPEAL

Continuance

The Bordons argue that their attorney had inadequate time to review discovery and prepare for trial due to the court's denial of their motion for a continuance.

We review the denial of a motion for continuance "for an abuse of discretion and specific, substantial prejudice." *United States v. Tokars*, 95 F.3d 1520, 1531 (11th Cir. 1996).

We consider the following factors in assessing claims of inadequate preparation time: "the quantum of time available for preparation, the likelihood of prejudice from denial, the accused's role in shortening the effective preparation time, the degree of complexity of the case, [ ] the availability of discovery from the prosecution . . . [and] the skill and experience of the attorney." *United States v. Garmany*, 762 F.2d 929, 936 (quoting *United States v. Uptain*, 531 F.2d 1281, 1286-87 (5th Cir. 1976)).

The record reflects that defense counsel had more than two months to prepare for trial. The Bordons were indicted

on June 9, 1998. On June 16, 1998, the court issued a standing discover order requiring the government to respond within fourteen days. On June 25, 1998, the government filed its discovery response. Later in June, the government held a discovery conference and made all evidence available for review to the defense. The trial commenced on August 17, 1998.

It appears that the delay in reviewing the discovery material and the consequent shortened preparation time was attributable to defense counsel's delay in seeking to further review and promptly duplicate evidence. The government made discovery available to the defense in accordance with the court's standing discovery order. The case did not present significantly complex issues. Defense counsel was experienced.[2] Based on these factors, we are unable to conclude that the district court abused its discretion in denying the Bordons' motion for continuance.

Duplicitous charging

The Bordons contend that Count II of the Indictment charging them with conspiracy to commit money laundering was duplicitous because it alleged that they conducted financial transactions "with the intent to promote the carrying on of [the illegal gambling business], *and* knowing that these

2. Although the district court did not expressly discuss all of the foregoing factors, it concluded that defense counsel was an experienced lawyer and could be ready for trial. The court expressed confidence in counsel's ability to prepare for trial. In response to defense counsel's statement that "[t]he government did not drag its feet," the court noted that "somebody did."

transactions were designed in whole or in part to conceal and disguise the nature, the location, the source, the ownership and the control of the proceeds of this [illegal gambling business]." (emphasis added). Since the Bordons failed to argue before trial that the indictment was infirm, they have waived this issue on appeal. *See United States v. Rivera*, 77 F.3d 1348, 1352 n.4 (11th Cir. 1996).

They also contend that they were deprived of a unanimous verdict because the district court did not instruct the jury as to which object of the conspiracy had been violated. Because they failed to timely object to the jury instructions or request special verdict forms on this ground, they have also waived this issue on appeal. *See United States v. Harmas*, 974 F.2d 1262, 1267 (11th Cir. 1992).

We may consider issues raised for the first time on appeal if they are purely legal and our "failure to consider [them] would result in a miscarriage of justice." *United States v. One Single Family Residence Located at 18755 North Bay Road, Miami*, 13 F.3d 1493, 1498 (11th Cir. 1994). The Bordons' claims do not meet this standard, since it is clear that an indictment is not duplicitous in setting forth "alternative ways in which the statute may be violated and each is subject to the same punishment." *United States v. Burton*, 871 F.2d 1566, 1573 (11th Cir. 1989). The indictment here merely charged the Bordons with alternative methods of violating 18 U.S.C. § 1956; each is subject to the same penalty.

Appendix A

Forfeiture

The Bordons contend that the forfeiture of approximately six million dollars was excessive and grossly disproportional to the offense charged because the indictment alleged that they received only 1% to 5% of the face amount of the bolita checks. They argue that the government improperly used an extrapolation method to calculate this amount.[3]

Because the Bordons failed to timely challenge the forfeiture calculations, we review them for plain error. *See United States v. Zapata*, 139 F.2d 1355, 1357 (11th Cir. 1998). We review the proportionality issue *de novo*, comparing the forfeiture amount to the gravity of the offense. *See United States v. Bajakajian*, 524 U.S. 321, 336-37 (1998).

If the forfeiture amount "is grossly disproportional to the gravity of the defendants[']s offense, it is unconstitutional" under the Eighth Amendment's Excessive Fines Clause. *Id.* at 335-37. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id.* at 334. We have previously addressed how

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3. "Any property, including money, used in violation of [18 U.S.C. § 1955, prohibiting illegal gambling businesses] may be seized and forfeited to the United States." 18 U.S.C. § 1955(d). Such property may be forfeited "if there is probable cause to believe that it was used in connection with the conducting, financing, managing, supervising, directing or owning of an illegal gambling business." *One Single Family Residence Located at 18755 North Bay Road, Miami*, 13 F.3d at 1495.

courts can translate "the gravity of a crime into monetary terms — such that it can be proportioned to the value of forfeited property." *United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304, 1309 (11th Cir. 1999), *cert. denied*, __ U.S. __, 120 S.Ct. 806 (2000). "[A] forfeiture within the congressional mandated range of fines is presumptively constitutional." However, "[a] forfeiture far in excess of the statutory fine range . . . is likely to violate the Excessive Fines Clause." *Id.* at 1309 n.9; *see also Bajakajian*, 524 U.S. at 338 (referring to maximum fine under the sentencing guidelines).

To calculate the dollar amount of all money that the defendants laundered during the four year period alleged in the indictment and the amount to be forfeited, the government used an extrapolation method. The government started with the amount that passed through the business (amount laundered) during an eighteen month period for which it had sufficient records to support specific itemization.[4] The total amount laundered during this eighteen month period was $2,252,474.55. The government then used this total to calculate an average monthly amount. The average figure was $125,135.47 per month. It then multiplied this average figure by 46 months (the almost 4 year period covered in the indictment). The total amount using this calculation method was $5,756,323.62. We find nothing wrong with this methodology. It was consistent with the evidence and not speculative. The money was involved in the illegal transactions and bore some relationship to the gravity of the charged offenses.

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4. The exact deposit amounts for the entire four year period alleged in the indictment were not available to the government.

Appendix A

The maximum fine for violating 18 U.S.C. § 1956 is $500,000 or twice the value of the property involved in the transaction, whichever is greater. . . ." 18 U.S.C. § 1956(a)(1)(B)(ii). Since the amount involved in the transactions and forfeited, $5,756,323.62, does not exceed the statutory maximum, the fine does not violate the Excessive Fines Clause.

Kastigar Hearing

The Bordons claim that their indictment was based on the testimony of government agents who debriefed them pursuant to a "proffer letter" or "use immunity agreement." They claim that the district court erred in failing to dismiss the indictment or at least hold a hearing pursuant to *Kastigar v. United States*, to determine whether the evidence used against them came from a source other than their immunized testimony.

The government and the Bordons entered into a proffer agreement wherein the Bordons agreed to proffer evidence and the government agreed not to use such evidence against them in "the case in chief in any future criminal proceeding." The agreement provided that the evidence may be used "derivatively in order to pursue leads resulting in evidence against [the Bordons] or others should no formal agreement be reached between the parties in the future regarding the disposition of th[e] putative charges." The agreement stated that it "obviates the viability of any potential hearings pursuant to . . . *Kastigar* . . . and its progeny should no formal agreement . . . be reached in the future." Applying principles of contract law, the district court interpreted this agreement

to "waive defendant[s'] possible right to request a *Kastigar* hearing." It reasoned that the Bordons "understood the contents of the letter they signed, and were aware that derivative use might be made of the information they provided." The court concluded that a *Kastigar* hearing was "unnecessary" and denied the Bordons' motion to dismiss the indictment.

"We review the district court's denial of [the] motion to dismiss the indictment for an abuse of discretion." *United States v. Pielago*, 135 F.3d 703, 707 (11th Cir. 1998). When a defendant demonstrates that he has testified under a grant of immunity, the government has the burden of showing that its evidence was obtained by "an independent, legitimate source." *Kastigar*, 406 U.S. at 460-61; *see generally United States v., Schmidgall*, 25 F.3d 1523 (11th Cir. 1994). We apply general principles of contract law to construe the proffer agreement. *See Pielago*, 135 F.3d at 709.

As in *Pielago*, the agreement in this case expressly permits the government to use evidence derived from proffered evidence. *See id.* at 710. Furthermore, it expressly waives the Bordons' right to a *Kastigar* hearing. The right to a *Kastigar* hearing is commensurate with the Fifth Amendment privilege against self-incrimination. *See Kastigar*, 406 U.S. at 461. A Fifth Amendment right can be waived by not invoking it. By the same token, the right to a *Kastigar* hearing can be waived by contract. *Cf. Taylor v. Singletary*, 148 F.3d 1276, 1281 (11th Cir. 1998) (in an immunity agreement, a defendant seeks benefits in exchange for his promise "to forego something to which he is entitled"), *cert. denied*, 525 U.S. 1109 (1999). Given

these principles, the district court did not abuse its discretion in denying the Bordons' motion to dismiss the indictment and by finding that the Bordons' waived their right to a *Kastigar* hearing.

For all of the foregoing reasons, the Bordons' convictions are affirmed.

GOVERNMENT'S CROSS-APPEAL

Base offense level

The government cross-appeals the Bordons sentences, arguing that the district court miscalculated their base offense levels at 20 instead of 23 under U.S.S.G. § 2S1.1, because the defendants were convicted of conspiring to violate 18 U.S.C. § 1956(a)(1)(A).

We review *de novo* a district court's decision regarding whether a particular sentencing guideline that sets a base offense level applies to the facts. *See United States v. Shriver*, 967 F.2d 572, 574 (11th Cir. 1992). Section 1956(h) provides that one who conspires to commit any offense defined in § 1956 or § 1957 will "be subject to the same penalties as those prescribed for the offense . . . which was the object of the conspiracy." 18 U.S.C. § 1956(h). Where the defendant is convicted under § 1956(a)(1)(A) for transactions intended to "promote" the underlying crime, the guidelines require a base offense level of 23. *See* U.S.S.G. § 2S1.1(a)(1). All other money laundering transactions, such as those intended to "conceal" the underlying crime, require a base offense level of 20. *See* U.S.S.G. § 2S1.1(a)(2).

Appendix A

The indictment charged the Bordons with operating an illegal gambling business in violation of 18 U.S.C. § 1955 and Section 849.09, Florida Statutes, as well as with conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(a)(1). After all the evidence was presented at trial, the court instructed the jury regarding the conspiracy charge as follows:

> This offense would occur when the following facts are proven beyond a reasonable doubt: . . . that the defendant engaged in the financial transaction with the intent to promote the carrying on of such specified unlawful activity, *or* knowing that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds of the specified unlawful activity. (emphasis added).

The verdict forms indicate that the jury found the Bordons guilty of both counts, but do not specify whether the jury found them guilty of "promoting" or "concealing." The judgment and conviction forms also indicate that the jury found the Bordons guilty of conducting an illegal gambling business in violation of 18 U.S.C. § 1955 and conspiracy to conduct financial transactions which involved the proceeds of specified unlawful activity in violation of 18 U.S.C. § 1956(h).

The indictment states that the object of the conspiracy was to both "promote" and "conceal" the illegal gambling business. Evidently, the jury convicted the Bordons of conspiring to commit money laundering with the intent to both conceal and promote the illegal gambling business.

In *United States v. Acanda*, 19 F.3d 616 (11th Cir. 1994), we determined that a defendant who pled guilty to conspiracy in violation of 18 U.S.C. § 371, with the object of that conspiracy being an intent to violate 18 U.S.C. § 1956(a)(1), should be sentenced under U.S.S.G. § 2S1.1(a)(1), with a base offense level of 23 because the defendant was convicted of conspiracy to violate the substantive offenses of §§ 1956(a)(1)(A), (a)(2)(A), or (A)(3)(A). *See id.* at 618-20. Likewise, in this case, because the Bordons were convicted of conspiracy to violate § 1956(a)(1)(A) and the object of the conspiracy was to promote and conceal the illegal gambling business, their base offense level should be 23. Thus, we vacate and remand for resentencing on this issue.

Downward Departure

The government also appeals the district court's two-level downward departure, arguing that the district court erred by relying on forbidden reasons for departure, and failed to make specific findings regarding its reasons for granting the departure.

According to the government, the district court improperly departed downward from the guidelines on the mistaken conclusion that the Bordons' activities fell outside the heartland of money laundering cases. It argues that (1) the district court mistakenly believed that the underlying state gambling offense was only a misdemeanor and that to the extent that the district court based its departure on the fact that the Bordons would have received a lesser sentence if they had been tried in state court, this basis was not sufficient to take the case out of the heartland of money

laundering cases; (2) the district court erred as a matter of law by believing that the money laundering guidelines were intended to cover mostly drug money laundering rather than gambling activities; (3) a general dissatisfaction with the sentencing scheme is an improper basis for departure; (4) the court's basis for departure is erroneous considering the extensiveness of the Bordons' laundering and illegal gambling activities; and (5) the district court failed to sufficiently articulate specific mitigating circumstances upon which it relied and the reasons why those circumstances were not adequately taken into consideration by the sentencing commission.

We review the district court's departure from otherwise applicable sentencing guideline ranges for an abuse of discretion. *See Koon v. United States*, 518 U.S. 81, 91 (1996).

In granting the downward departure, the district court determined that the case "depart[s] from the heartland consideration of the Sentencing Commission" and that "money laundering in what [are] substantially misdemeanor offenses under statutes for the offense of operating a bolita business, would not rise to the level that this type of sentencing should apply."

Departures under U.S.S.G. § 5K2.0 should be reserved for "unusual" cases, atypical defendants or significantly different circumstances surrounding the commission of the crime, which differ from the "heartland of conduct in a typical case. *See United States v. Onofre-Segarra*, 126 F.3d 1308, 1310 (11th Cir. 1997). "A district court determines whether a case falls outside the heartland by making a refined

assessment of the facts of the case, comparing those facts to the facts of other cases falling within the guideline's heartland." *United States v. Hoffer*, 129 F.3d 1196, 1200 (11th Cir. 1997). A district court "should articulate the specific mitigating circumstances upon which it relies and the reasons these circumstances are of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission," when it grants a downward departure. *United States v. Baker*, 19 F.3d 605, 616 (11th Cir. 1994); *see also Onofre-Segarra*, 126 F.3d at 1312 (If a district court determines that a downward departure is warranted, it should "make explicit findings of fact with regard to the circumstances meriting the departure, state whether departure under such circumstances is consistent with the guideline's goals and . . . justify the extent of the departure."). "A court may not depart from the sentencing guidelines, however, merely because it believes that the sentence mandated is excessive," *id.* at 1311, or because a defendant would have received a lesser sentence if he had been tried in state court. *See United States v. Searcy*, 132 F.3d 1421-22 (11th Cir. 1998).

The district court's explanation for a downward departure here reflects a dissatisfaction with the sentence mandated for money laundering crimes. Moreover, the court's conclusion that the Sentencing Commission intended that U.S.S.G. § 2S1.1 should only be applied to money laundering cases related to drugs is inconsistent with our holding in *United States v. Adams*, 74 F.3d 1093, 1102 (11th Cir. 1996), where we observed that Congress intended to criminalize a "**broad array** of money laundering activity," and that "a departure that completely negates the effect of

[the defendant's] money laundering convictions is clearly erroneous and an incorrect application of the Guidelines." *Id.* (emphasis added). Additionally, the court's' conclusion that the underlying state violation would have been punishable as a misdemeanor is also erroneous given the holding in *Searcy*, 132 F.3d at 1422. Finally, the district court failed to make any findings or provide reasoning to support the conclusion that the Bordons presented the type of rare case not within the heartland of money laundering cases. Because the district court abused its discretion in departing downward by two levels by failing to make adequate factual findings and by departing on the belief that the mandated sentence was excessive, we must vacate the sentence and remand for re-sentencing.

CONCLUSION

We find no error by the district court regarding the issues raised by the Bordons. The court, however, erred in its sentencing. We affirm the Bordons' convictions, vacate their sentences and remand the case for re-sentencing.

VACATED AND REMANDED FOR RE-SENTENCING.

APPENDIX B — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED SEPTEMBER 27, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-5841-BB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUIS ADEL BORDON, LUIS BORDON, ADEL BORDON,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before BIRCH, CARNES, and WILSON, Circuit Judges.

Appendix B

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible] UNITED STATES CIRCUIT JUDGE